No. 15-674

In the Supreme Court of the United States

UNITED STATES OF AMERICA *et al.*,

Petitioners,

v.

STATE OF TEXAS, *et al.*,

Respondents.

On Writ of *Certiorari* to the U.S. Court of Appeals for the Fifth Circuit

BRIEF FOR EAGLE FORUM EDUCATION & LEGAL DEFENSE FUND AS *AMICUS CURIAE* SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

The Executive Branch unilaterally created a program to deem 4 million unlawfully present aliens as "lawfully present" and eligible for a host of benefits including work authorization. Pet. App. 413a. This program, called DAPA, goes far beyond forbearing from removal or enforcement discretion.

The district court entered a preliminary injunction of DAPA under the Administrative Procedure Act. The court of appeals affirmed. Both courts explained that the injunction does not require the Executive to remove any alien and does not impair the Executive's ability to prioritize aliens for removal. In fact, on the same day it announced DAPA, the Executive issued a separate memorandum defining categories of aliens prioritized for removal. This lawsuit has never challenged that separate memorandum. The questions presented are:

1.a. Whether at least one plaintiff has a stake in this controversy sufficient for standing, when record evidence confirms that DAPA will cause States to incur millions of dollars in injuries.

1.b. Whether DAPA – which affirmatively grants lawful presence and work-authorization eligibility – is reviewable agency action.

2. Whether DAPA violates immigration and related benefits statutes, when Congress has created detailed criteria for which aliens may be lawfully present, work, and receive benefits in this country.

3. Whether DAPA – one of the largest changes in immigration policy in our history – is subject to the APA's notice-and-comment requirement.

4. Whether the Guidance violates the Take Care Clause of the Constitution, Art. II, § 3.

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Eagle Forum Education & Legal Defense Fund, Inc. ("EFELDF") is a nonprofit corporation founded in 1981. For more than thirty years, EFELDF has defended American sovereignty and promoted adherence to federalism and the separation of powers under the U.S. Constitution. In addition, EFELDF has consistently opposed unlawful behavior, including illegal entry into and residence in

[1] This *amicus* brief is filed with written consent of all parties; the respondents' written consent has been lodged with the Clerk of the Court, and the other parties lodged blanket consents with the Clerk. Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief; no party's counsel authored this brief in whole or in part, nor did any person or entity other than *amicus*, its members, and its counsel make a monetary contribution to the preparation or submission of this brief.

the United States, and supported enforcing immigration laws. For all these reasons, EFELDF has direct and vital interests in the issues before this Court.

STATEMENT OF THE CASE

Twenty-six states (collectively, hereinafter, "States") sued several federal officers with duties over federal immigration law (collectively, the "Administration" or "Admin.") to challenge the officers' implementation of a program known as "DAPA" as well as its expansion of a prior program known as Deferred Action for Childhood Arrivals ("DACA"). Like DACA, DAPA seeks to protect illegal aliens from removal under federal immigration law by upgrading their immigration status to lawfully present aliens and allowing them, thereby. to obtain a variety of benefits, including work authorization. Although the States challenge DAPA as both substantively and procedurally invalid, the District Court issued a preliminary injunction based only on DAPA's failure to undergo the notice-and-comment rulemaking required by the Administrative Procedure Act, 5 U.S.C. §§551-706 ("APA"), Pet. App. 385a-92a, and the Administration filed an interlocutory appeal.

The Fifth Circuit affirmed, holding DAPA invalid both procedurally and substantively. Pet. App. 66a-67a, 85a-86a. Before explaining why this Court should affirm, *amicus* EFELDF first responds to the Administration's hyperbolic characterization of the Fifth Circuit's standing analysis as a "radical expansion of state standing [that] would force courts to hear a vast new range of challenges to federal policies," Admin. Br. 31, and "permit[] a State, through the federal judiciary, to interfere with the federal government's administration of the immigration laws as to third-party aliens." *Id.* 28. By relying on preemption cases

on immigration such as *Arizona v. U.S.*, 132 S.Ct. 2492 (2012), the Administration suggests that the States (and lower courts) are violating federalism – the divide between state and federal sovereigns. That rhetoric likely derives from the fact that the state-federal divide tips to the federal side for immigration, but it is entirely inapposite to what *this litigation* concerns. Here, the Administration – *i.e.*, the President and his officers – adopted immigration rules that violate immigration laws that Congress enacted, and previous presidents signed. It is that divide – not federalism but the separation of powers – that is at issue here. The fact that the plaintiffs are states does not make this a federalism case; the plaintiffs could be individuals with an Article III injury just as easily as states. In filing such suits, the plaintiff asserts the power of Congress to make the laws and the right of the rest of us to live under duly enacted laws.

For a time, each Administration has the right to assert arguments for the titular party "United States of America," but the Administration is not the United States. The Administration is one branch of a divided federal government, and a branch that has a duty to execute faithfully the laws that another branch – Congress – enacts. This Court heads the third branch, which must referee claims that the Administration has violated that duty. In such cases, it is no defense that Congress refused to enact laws favored by the Administration.

Because this Court has never held that separation-of-powers claims are outside the reach of ordinary plaintiffs – whether the States or the People – the remarkable issue here is not how far the States intrude into federal immigration policy, but

how far the Administration *acts* beyond federal immigration *law*. Article III and the judiciary's prudential restrictions open federal courts to anyone with a case or controversy sufficiently related to the laws Congress enacted. It is troubling that the Administration finds that troubling.

Constitutional Background

Congress has plenary power to regulate immigration. U.S. CONST. art. I, §8, cl. 4. Although the "[p]ower to regulate immigration is unquestionably exclusively a federal power," *DeCanas v. Bica*, 424 U.S. 351, 354 (1976), this Court has never held that every "state enactment which in any way deals with aliens" constitutes "a regulation of immigration and thus [is] *per se* pre-empted by this constitutional power, whether latent or exercised." *Id.* at 355 (mere "fact that aliens are the subject of a state statute does not render it a regulation of immigration").

For its part, the Executive Branch has the duty to take care that the laws are faithfully executed. U.S. CONST. art. II, §3. Except where Congress has delegated rulemaking authority to the Executive Branch, "[a]ll legislative Powers [are vested] in [the] Congress." U.S. CONST. art. I, §1.

Under Article III, federal courts are limited to hearing cases and controversies, U.S. CONST. art. III, §2, which is relevant here primarily in the "bedrock requirement" of standing. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). This limit is "fundamental to the judiciary's proper role in our system of government." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 37 (1976). In both its constitutional and prudential strands, standing is "founded in concern about the proper – and properly

limited – role of the courts in a democratic society." *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (interior quotations and citations omitted). Indeed, standing is "*crucial* in maintaining the tripartite allocation of power set forth in the Constitution." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (interior quotations omitted, emphasis added).

Statutory Background

The States and Administration outline the history of federal immigration law, States Br. 2-8; Admin. Br. 50-60, so *amicus* EFELDF focuses only on the points salient to this brief. The Immigration Reform & Control Act, PUB. L. NO. 99-603, 100 Stat. 3359 (1986) ("IRCA"), began the process of amending the Immigration and Naturalization Act, 8 U.S.C. §§1101 1537 ("INA"), to protect against illegal aliens' working here. IRCA, and thus INA post-1986, generally "prohibit[s] the employment of aliens" who "entered the country illegally." H.R. Rep. No. 99-682(I), at 46, 1986 U.S.C.C.A.N. 5649, 5650. Two INA amendments in 1996 – the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA")[2] and Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA")[3] -- accelerated the effort by Congress to discourage illegal immigration by eliminating work and other benefits. With PRWORA, Congress found "a compelling government interest ... to remove any incentive for illegal immigration," H.R. CONF. REP. NO. 104–725, at 378

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2 PUB. L. NO. 104-208, §505(a), 110 Stat. 3009, 3009-672 (1996).

3 PUB. L. NO. 104-193, 110 Stat. 2105 (1996).

(July 30, 1996), and implemented the lawful-presence requirements at issue here. *Id.* at 383.

Factual Background

Amicus EFELDF adopts the factual background in the States' brief (9-14), but emphasizes the following points here:

- After DACA's issuance, the President indicated that DACA represented the limit of his authority without new legislation: "if we start broadening that, then essentially I would be ignoring the law in a way that I think would be very difficult to defend legally." JA:388.
- Instead, the President urged Congress to enact a comprehensive immigration bill he favors, JA:23-26, which Congress did not do.
- The Administration then issued DAPA, which if implemented would cover four million unlawfully present aliens. JA:95-96.
- After DAPA's issuance, the President admitted that he "just took an action to change the law," Pet. App. 384a, and that DAPA confers "a legal status." States Br. 13.
- Analogizing to military orders, JA:790, he warned agents "who aren't paying attention to our new directives" of "consequences." JA:788-90.

SUMMARY OF ARGUMENT

To establish standing, a plaintiff must show an "injury in fact" that is "arguably within the zone of interests to be protected or regulated" by the relevant statutory or constitutional provision. *Ass'n of Data Processing Serv. Org., Inc. v. Camp*, 397 U.S. 150, 153 (1970). The States readily meet both tests. First, the States have standing not only because they provided ample evidence of financial injury and federal courts

owe states "special solicitude in standing analysis" under *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007), but also because – aside from costs – DAPA imposes administrative burdens (Section I.A.1). Further, standing analysis relaxes Article III's immediacy and redressability prongs for procedural-rights plaintiffs (Section I.A.4), and this Court can and should recognize that states can have *parens patriae* standing to enforce federal law against *ultra vires* administrative action because federal officers' *ultra vires* actions are not sovereign (Section I.A.5). Finally, insofar as the States allege that DAPA is *ultra vires* DHS's authority and violates constitutional separation-of-powers principles, the zone-of-interest test uses the broadest-possible zone, rather than the more narrow, immigration-law zones of interest that the Administration suggests (Section I.B).

With respect to the availability of judicial review, the general, rebuttable presumption that enforcement discretion is unreviewable from *Heckler v. Chaney*, 470 U.S. 821 (1985), is inapplicable here for two reasons: (1) the relevant statutes here require these enforcement proceedings, which gives a reviewing court "law to apply" versus the agency's chosen nonenforcement path (Section I.C.1); and (2) unlike an instance of nonenforcement like *Heckler*, the Administration here has taken final agency action in the form of the promulgated DAPA (Section I.C.2). In addition, the issues raised here are neither procedurally nor substantively committed to agency discretion and thus fall within the APA's "hospitable" and presumptive review (Section I.C). Further, the APA requires that post-APA preclusion-of-review statutes displace APA review *expressly*, which no statute does here (Section I.C.3). Indeed, pre-APA

equity review would be available, even if APA review were not (Section I.C.4), placing the Administration's interpretation at odds with the canon against construing subsequent statutes to repeal prior ones by implication – a canon that that applies with particular strength to judicial review.

DAPA's promulgation violated the statutory and constitutional requirements for making rules with legal effect (Section II). First, DAPA required APA notice-and-comment rulemaking because DAPA had binding effect and affected public rights and obligations (Section II.A). Second, insofar as APA rulemaking is an express exception to the Article I law-making power delegated to Congress, agencies that issue legislative rules without APA-compliant procedures violate the Constitution (Section II.B).

DAPA violates INA substantively by giving a more favorable pathway to lawful-presence status than INA provides (or even allows) for parents with children having either citizen or lawful-presence status, and it violates INA procedurally by moving illegal aliens to one possible (and favorable) outcome to INA's required removal proceedings, without initiating the required removal proceeding in the first place (Section III.A). The Administration's claim to congressional ratification of deferred-action efforts cannot support DAPA due to the lack of favorable appellate authority, Congress's 1986 and 1996 efforts to require removal and avoid illegal aliens' working here, the unprecedented scope of DAPA, and DAPA's inconsistency with the INA's plain language (Section III.B).

Although the Constitution requires the President to "take Care that the Laws be faithfully executed." U.S. CONST. art. II, §3, DAPA violates the Take Care

Clause because the Administration knew that DAPA violated INA and willfully adopted DAPA in violation of INA (Section IV). Although the Take Care violation parallels the INA violations, the willfulness precludes mootness based on a newly promulgated DAPA version, absent the Administration's truly ceasing the underlying conduct at issue.

ARGUMENT

I. THIS CASE IS JUSTICIABLE.

Federal courts have jurisdiction over a case if "the right of [plaintiffs] to recover under [their] complaint will be sustained if the ... laws of the United States are given one construction," even if the plaintiffs' rights "will be defeated if [those federal laws] are given another." *Wheeldin v. Wheeler*, 373 U.S. 647, 649 (1963) (interior quotations omitted). Accordingly, federal courts typically consider their jurisdiction before the merits. Indeed, federal courts should assume *the plaintiff's* merits views in evaluating their jurisdiction to hear the plaintiff's claims: "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal." *Warth v. Seldin*, 422 U.S. 490, 500 (1975); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) ("one must assume the validity of a plaintiff's substantive claim at the standing inquiry"). Here, the States' merits arguments *reinforce* their jurisdictional arguments in several respects. *See* Sections I.B (zone of interest for *ultra vires* agency action), I.A.4 (procedural-rights standing), *infra*.

A. The States' injuries are cognizable under Article III.

An "injury in fact" is (1) an actual or imminent invasion of a constitutionally cognizable interest,

(2) which is causally connected to the challenged conduct, and (3) which likely will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-62 (1992). For injuries directly caused by government action, plaintiffs can show injury with "little question" of causation or redressability; by contrast, when government action causes third parties to inflict injury, plaintiffs must show more to establish causation and redressability. *Defenders of Wildlife*, 504 U.S. at 561-62. Here, the States suffer both direct and indirect injury from DAPA, which makes causation and redressability obvious: enjoin enforcement of DAPA, and the States' injuries will cease or *at least* lessen. That is particularly so given the "special solicitude in standing analysis" that federal courts must accord to states "protecting [their] quasi-sovereign interests." *Massachusetts*, 549 U.S. at 520. The following subsections analyze the States' injuries for purposes of standing.

1. The States suffer increased costs and administrative burdens from DAPA's converting illegal aliens into lawfully present aliens.

Plaintiffs obviously have standing to challenge actions that negatively impact them economically, *Diamond v. Charles*, 476 U.S. 54, 66 (1986), and the burden need not be crushing: an "identifiable trifle" suffices. *U.S. v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 689 n.14 (1973) (internal quotations omitted). A sufficient trifle includes "plaintiffs with no more at stake ... than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax." *Id.* (citations omitted). *Amicus* EFELDF respectfully submits, however, that the arguments here make standing more complex than necessary.

Whereas the *type of injury* can determine standards of review – and thus be outcome-determinative on the merits – as with equal-protection claims, garden-variety Article III injury can be as simple as increased administrative burdens, which "[c]learly... me[e]t the constitutional requirements" for injury for plaintiffs asserting the "right to be free of arbitrary or irrational [government] actions." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 263 (1977). As explained below, the States readily meet these tests for both economic and administrative burdens.

2. Increased licensing costs are not self-inflicted injuries.

Notwithstanding its support for DACA beneficiaries' equal-protection rights to driver's licenses in *Arizona Dream Act Coalition v. Brewer*, 757 F.3d 1053 (9th Cir. 2014), the Administration claims that the States' – and particularly Texas's – decision to subsidize driver's licenses does not support standing here because that decision constitutes a self-inflicted injury by Texas. Admin. Br. 24-29. To make that argument work, the Administration would need to establish that the States can offer subsidies to all applicants except DAPA beneficiaries and deny either the subsidies or licenses altogether to DAPA beneficiaries. It would be no defense for the Administration to argue that the Equal Protection Clause – and not DAPA – would require the States to provide benefits to DAPA beneficiaries. Such third-party indirection easily equates to first-party injury when the result is compelled by law, as opposed to policy choices. *Simon*, 426 U.S. at 45 n.25. The Administration cannot have it both ways (*i.e.*, DAPA avoids review on standing, but DAPA beneficiaries get State benefits under Equal Protection).

As interesting as it might be to watch this Administration attempt to make the required showing for driver's licenses, it would prove to be for naught because the Administration would then need to make the same showing for Medicare and every other benefit that the States identify. *See* States Br. 28. At some point, the task would prove impossible. For example, 8 U.S.C. §1611(b)(2)-(3) provides certain Medicare benefits immediately upon an illegal alien's obtaining DAPA's lawful-presence status. The Administration cannot defend these imposed costs as self-inflicted injuries because the States have a right to continue their chosen, pre-DAPA public policies without the Administration's *unlawfully* imposing higher costs and administrative burdens. Forcing the States to withdraw these programs for everyone as a basis for avoiding them on DAPA beneficiaries would inflict sovereign injuries on the States, so the only way for the Administration's self-inflicted-injury argument to work would be if the States could carve DAPA beneficiaries out of all these pre-DAPA benefits.

3. Standing analysis does not consider indirect benefits that may offset costs imposed by a defendant's actions.

The claim that tax benefits to some State agencies will offset DAPA's increased licensing and Medicare administrative burdens and costs – for example, at the Texas Department of Motor Vehicles ("DMV") and Health and Human Services Commission ("HHSC"), respectively – would be irrelevant, even if it could be

supported factually.[4] As the States explain, the law of standing does not engage in dollar-for-dollar economic netting in the circumstances here, States' Br. 29-30, but such netting would not save the Administration *even if it applied*. Specifically, economic netting would not undercut the States' standing from *administrative burden* (as distinct from out-of-pocket costs), and it would not prevent discrete state agencies such as Texas's DMV or HSSC from pressing *their* economic claims. Those agencies do not receive the alleged tax boon, even if some other State agency would. To the extent that these discrete agencies constitute necessary parties not subsumed with the nominal State parties, these agencies can, of course, be joined, even on appeal. *Mullaney v. Anderson*, 342 U.S. 415, 416-17 (1952) ("dismiss[ing] the present petition and require[ing] the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration").

4. **Article III's immediacy requirements are relaxed for procedural-rights violations like DAPA.**

Significantly, this litigation alleges procedural violations, *see* Section II, *infra*, which lower the bar for Article III standing. "The history of liberty has largely been the history of observance of procedural safeguards," *Corley v. U.S.*, 556 U.S. 303, 321 (2009) (interior quotations omitted), and "'procedural rights' are special," *Defenders of Wildlife*, 504 U.S. at 572 n.7 (interior quotations omitted). For procedural injuries,

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[4] *Amicus* EFELDF understands that Texas has no income tax, which undercuts the Administration's arguments vis-à-vis Texas.

Article III's redressability and immediacy requirements apply to the *present procedural violation* (which may someday injure a concrete interest) rather than to the concrete future injury. *Defenders of Wildlife*, 504 U.S. at 571-72 & n.7; *cf. DaimlerChrysler Corp.*, 547 U.S. at 353 & n.5 ("once a litigant has standing to request invalidation of a particular [government] action, [the litigant] may do so by identifying all grounds on which the agency may have failed to comply with its statutory mandate"); *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-81 (1978) (standing doctrine has no nexus requirement outside taxpayer standing). Procedural-rights standing thus undercuts the Administration's miserly interpretation of Article III.

Significantly, the States need not show that notice-and-comment rulemaking would result in a rule more to their liking: "If a party claiming the deprivation of a right to notice-and-comment rulemaking under the APA had to show that its comment would have altered the agency's rule, section 553 would be a dead letter." *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002). Instead, *vacatur* would put the parties back in the position they should have been in all along, which provides enough redress, even if the Administration *potentially could* take action on remand, leaving the States no better off. Remand redresses the injury "even though the agency (like a new jury after a mistrial) might later, in the exercise of its lawful discretion, reach the same result for a different reason." *FEC v. Akins*, 524 U.S. 11, 25 (1998). When considered in the procedural-rights context, the States clearly have standing.

5. This Court should recognize the States' *parens patriae* standing against *ultra vires* federal agency action.

Notwithstanding this Court's suggestion that States lack *parens patriae* standing against the Federal Government, *Alfred L. Snapp & Son v. P.R.*, 458 U.S. 592, 610 n.16 (1982), the States press *parens patriae* standing to protect their citizens from the unlawful competition that DAPA beneficiaries will present, States Br. 30-31, arguing that the negative precedent concerns state efforts to protect their citizens *from federal law*, as distinct from the States' efforts here to *enforce federal law* against *ultra vires* administrative action. *Amicus* EFELDF respectfully submits that this Court should accept the States' distinction.

The States have named not only federal administrative officers, but also the United States as defendants, as the United States' waiver of sovereign immunity expressly allows. 5 U.S.C. §702. Even if the federal sovereign outranks the States for purposes of *parens patriae,* the officer defendants do not: "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949).

For purposes of making law, Congress – not the Executive Branch – represents the United States' sovereignty, U.S. CONST. art. I, §1, but enjoining the officers' *ultra vires* actions will redress the States' injuries, even if injunctive relief is unavailable against the United States itself:

> For purposes of establishing standing, however, we need not decide whether injunctive relief against the President was appropriate, because we conclude that the injury alleged is likely to be redressed by declaratory relief against the Secretary alone.

Franklin v. Massachusetts, 505 U.S. 788, 803 (1992). Accordingly, the States have *parens patriae* standing against the officer defendants.

B. The States' injuries and claims satisfy the zone-of-interest test.

The "zone of interest" prong of standing is a prudential doctrine that asks "whether the interest sought to be protected by the complainant is *arguably* within the zone of interests to be protected... by the statute." *Nat'l Credit Union Admin. v. First Nat'l Bank & Trust, Co.*, 522 U.S. 479, 492 (1998) (interior quotations omitted, emphasis and alteration in original). Because standing assumes the plaintiffs' merits views – here, that the Administration lacks substantive and procedural authority for DAPA – either the zone-of-interest test is inapplicable or it applies the zone from the overarching constitutional issues raised by lawless agency action:

> It may be that a particular constitutional or statutory provision was intended to protect persons like the litigant by limiting the authority conferred. If so, the litigant's interest may be said to fall within the zone protected by the limitation. Alternatively, it may be that the zone of interests requirement is satisfied because the litigant's challenge is best understood as a

> claim that *ultra vires* governmental action that injures him violates the due process clause.

Haitian Refugee Ctr. v. Gracey, 809 F.2d 794, 812 n.14 (D.C. Cir. 1987); *Chiles v. Thornburgh*, 865 F.2d 1197, 1211 (11th Cir. 1989) (same). By acting outside its constitutional power and delegation, the Administration purports to make law without the constitutional process for doing so.[5]

The Constitution's separation of powers is not a mere technicality – it is an indispensable bulwark against executive tyranny. The Founders regarded the Constitution's "separation of governmental powers into three coordinate Branches [as] *essential* to the preservation of liberty." *Mistretta v. U.S.*, 488 U.S. 361, 380 (1989) (emphasis added). By decentralizing power among the three branches (and

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[5] In defending similar federal overreach, the U.S. Department of Justice often cites *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 n.11 (1984), for the proposition that "[a] claim of error in the exercise of [delegated] power is ... not sufficient" to allege *ultra vires* action. Because it involved an agency delegated "broad discretion to provide *'adequate'* mental health services" and plaintiffs who argued "that [officers] have not provided such services *adequately*," 465 U.S. at 102 (emphasis added), *Pennhurst* could not erase the bright line that "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689. The Supreme Court recently clarified that there are no sliding scales of *ultra vires* conduct: "Both their power to act and how they are to act is authoritatively prescribed by Congress, so that when they act improperly, no less than when they act beyond their jurisdiction, what they do is *ultra vires*." *City of Arlington v. FCC*, 133 S.Ct. 1863, 1869 (2013) (emphasis added). DAPA is no mere mistaken exercise of delegated power. It is a wholesale power grab.

between the House and the Senate within the legislative branch), the Founders intended separation of powers to protect liberty. *U.S. v. Munoz-Flores*, 495 U.S. 385, 394-96 (1990); *Bond v. U.S.*, 131 S.Ct. 2355, 2365 (2011) ("[t]he structural principles secured by the separation of powers protect the individual"). Indeed, the "aim of [the separation of powers] is to protect ... the whole people from improvident laws," *Metro. Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise*, 501 U.S. 252, 271 (1991) ("*MWAA*"), not merely to protect the institutional prerogatives of the respective branches. Provided that parties who seek to assert separation-of-powers injuries have otherwise justiciable claims, *Bond*, 131 S.Ct. at 2366, they may assert the procedural injuries from separation-of-powers violations. More importantly, the zone at issue is broad enough "to protect ... *the whole people* from improvident laws." *MWAA*, 501 U.S. at 271 (emphasis added). That zone obviously includes the circumstances here.

Even if not the intended beneficiaries, the States can satisfy the zone of interests as "suitable challengers" if their "interests... [are] sufficiently congruent with those of the intended beneficiaries that [they] are not more likely to frustrate than to further the statutory objectives." *First Nat'l Bank & Trust Co. v. N.C.U.A.*, 988 F.2d 1272, 1275 (D.C. Cir. 1993) ("*NCUA*"). Here, the States' claims are congruent with their citizens' interests in immigration law's protection of the U.S. workforce: "[a] primary purpose in restricting immigration is to preserve jobs for American workers." *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 893 (1984). Indeed, even *otherwise-unsuitable* challengers can nonetheless be suitable to enforce "statutory demarcation[s], *such as*

an entry restriction, because the potentially limitless incentives of competitors [are] channeled by the terms of the statute into suits of a limited nature brought to enforce the statutory demarcation." *Honeywell Int'l, Inc. v. EPA*, 374 F.3d 1363, 1370 (D.C. Cir. 2004) (citing cases) (emphasis added, alteration in original), *withdrawn on part on other grounds*, 393 F.3d 1315 (D.C. Cir. 2005); *NCUA*, 988 F.2d at 1278; *Scheduled Airlines Traffic Offices, Inc. v. D.O.D.*, 87 F.3d 1356, 1360-61 (D.C. Cir. 1996). For these reasons, *amicus* EFELDF respectfully submits, this Court should find the zone-of-interest test readily satisfied here.

C. DAPA is not unreviewably committed to agency discretion under *Heckler*.

The types of enforcement discretion that *Heckler* insulates from review are agency *inaction* on a particular enforcement matter, not final agency action in the issuance of a specific rule. Although inaction can constitute "agency action" under the APA, 5 U.S.C. §551(13), that extends only to inaction on discrete actions that the agency was legally required to take, as distinct from programmatic inaction. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 62-63 (2004). Where agencies indeed act, "applying some particular measure across the board ... it can of course be challenged under the APA." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 n.2 (1990). The Administration's arguments under *Heckler* are specious.

The Administration's claims of "enforcement discretion" under *Heckler* cannot insulate DAPA from review for two independent reasons. First, federal immigration law includes provisions that govern the procedural question presented here, so this is not a garden-variety statute with unfettered enforcement

discretion. Instead, reviewability hinges on the specific fetters that Congress placed in *this statute*. Second, DAPA is not simply a decision to focus the available enforcement resources; it is a rule that provides benefits to a class of DAPA beneficiaries and so remains reviewable as a rule. As Chief Justice Marshall famously put it, "[w]e have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given." *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 404 (1821). Indeed, federal courts have a "virtually unflagging obligation ... to exercise the jurisdiction given them." *Colorado River Water Conserv. Dist. v. U.S.*, 424 U.S. 800, 817 (1976). EFELDF respectfully submits that federal courts are obligated to provide judicial review here.

1. **Enforcement policies are reviewable where – as here – a court has law to apply.**

Heckler held that federal courts could not review the U.S. Food & Drug Administration's decision not to enforce the Federal Food, Drug, and Cosmetic Act against certain drugs in a challenge by prison inmates sentenced to death by lethal injection of those drugs. Although the Administration cites *Heckler* for the proposition that the Administration is best suited to set its enforcement priorities, federal law places both substantive and procedural limits on how those priorities get set.

The concept of unreviewable agency discretion did not begin with the APA, much less with *Heckler*, *see, e.g.*, *Gray v. Powell*, 314 U.S. 402, 412 (1941); Kenneth Culp Davis, *"Nonreviewable Administrative Action,"* 96 U. PA. L. REV. 749, 750-51 (1948), but the APA did provide "generous review provisions" and require "hospitable interpretation" favoring review. *Abbott*

Laboratories v. Gardner, 387 U.S. 136, 140-41 (1967), of final agency actions like DAPA. 5 U.S.C. §704. As relevant in *Heckler*, 5 U.S.C. §701(a)(2) exempts "agency action ... committed to agency discretion by law" from APA review. *Heckler*, 470 U.S. at 830. Although recognizing this as "a *very narrow* exception," this Court has relied on the APA's legislative history to make this exception "applicable in those *rare instances* where statutes are drawn in such broad terms that in a given case there is no law to apply." *Id.* (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971)) (interior quotations omitted, emphasis added). The question is whether this is one of the "rare instances" where that "very narrow exception" applies.

Congress made removal proceedings mandatory precisely because the Administration's predecessors were too lenient in enforcing immigration laws. *Compare Reno v. American-Arab Antidiscrimination Committee*, 525 U.S. 471, 483-84 (1999) (discussing deferred action) *with* H.R. REP. NO. 104-725, at 383 (1996) ("illegal aliens do not have the right to remain in the United States undetected and unapprehended"). Obviously, agency inaction in the face of statutory mandates cannot qualify as unreviewable enforcement discretion. *See, e.g., Ass'n of Irritated Residents v. EPA*, 494 F.3d 1027, 1032 (D.C. Cir. 2007). Indeed, *Heckler* itself recognizes as much by holding that, if there is "law to apply" for APA review, any presumption of non-reviewability is rebutted. *Heckler*, 470 U.S. at 834-35. That is the situation applicable here.

2. *Heckler* and its progeny do not preclude review of actual rules.

An agency policy document like DAPA would be reviewable final agency action, even if a particular instance of discretion not to enforce a statute were not reviewable. Indeed, nothing in *Heckler* and the enforcement-discretion cases applies to written rules. *Heckler* specifically exempts the "abdication" claim in *Adams v. Richardson*, 480 F.2d 1159, 1161-63 (D.C. Cir. 1973) (*en banc*), for review of conscious policies of nonenforcement:

> Nor do we have a situation where it could justifiably be found that the agency has "consciously and expressly adopted a general policy" that is so extreme as to amount to an abdication of its statutory responsibilities. *See, e. g., Adams v. Richardson*, ... 480 F.2d 1159 (1973) (*en banc*).

Heckler, 470 U.S. at 833 n.4; *accord id.* at 839 ("the Court ... does not decide today that nonenforcement decisions are unreviewable in cases where ... an agency engages in a pattern of nonenforcement of clear statutory language, as in *Adams v. Richardson*") (Brennan, J., concurring) (citations omitted). In *Adams*, the conscious policy – namely, failing to terminate federal funding for schools found to have discriminated based on race in violation of Title VI – was unwritten.[6]

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[6] The conscious policy represented the failure to commence fund-termination proceedings against schools that "reneged on previously approved desegregation plans or were otherwise out of compliance." *Adams*, 480 F.2d at 1163.

For rules like DAPA that "apply[] some particular measure across the board," "of course" a "challenge[] under the APA" is available. *Nat'l Wildlife Fed'n*, 497 U.S. at 890 n.2. Indeed, *amicus* EFELDF respectfully submits that it is commonplace to require considering *applications* of federal standards in specialized forums while allowing APA review of the systemic lawfulness of the federal standards in federal court:

> While the Act vested state courts with exclusive jurisdiction over claims challenging a state agency's application of federal guidelines to the benefit claims of individual employees, there is no indication that Congress intended § 2311(d) to deprive federal district courts of subject-matter jurisdiction under [28 U. S. C. §1331] to hear statutory or constitutional challenges to the federal guidelines themselves.

Int'l Union v. Brock, 477 U.S. 274, 285 (1986). Moreover, the Administration's narrow confines for judicial review are belied both by the availability of judicial review under the circumstances here before and after APA's enactment and by INA's lack of an express repeal of that review.

3. The pre-INA APA allowed review, and INA did not displace review.

Nothing in the original 1946 APA repealed the review that the States could have had in equity before 1946. Moreover, neither INA's enactment in 1952 nor any of the subsequent INA amendments expressly precludes resort to APA review. For post-APA statutes, 5 U.S.C. §559 requires *express* statements to remove otherwise-applicable APA review.

Although the APA – as enacted – did not override any pre-APA statute that *expressly or impliedly* denied review, 5 U.S.C. §702 ("[n]othing herein ... confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought"), post-APA statutes must deny review *expressly*. 5 U.S.C. §559 ("[s]ubsequent statute may not be held to supersede or modify this subchapter ..., except to the extent that it does so expressly"); *Dickinson v. Zurko*, 527 U.S. 150, 154-55 (1999).[7] Decisions finding implied preclusion for pre-APA statutes are inapposite to post-APA statutes. *Compare* 5 U.S.C. §702 *with id.* §559.[8] Consequently, as *post-APA* statutes, for INA and its subsequent amendments to preclude APA review, they would need to do so *expressly*, but they do not.

4. Pre-APA equity review would suffice, even if Congress had never enacted APA.

As indicated in the prior section, the APA does not preclude review. But even if the APA did preclude it, review would still lie with pre-APA equity review. Even before the original APA provided a cause of action or the APA's 1976 amendments waived federal sovereign immunity, judicial review was available in

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[7] The leading *implied-preclusion* authorities concern *pre-APA* statutes. *See, e.g., Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984) (Agricultural Marketing Agreement Act of 1937); *FCC v. ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984) (Communications Act of 1934). These decisions have no bearing on the preclusion of review under post-APA statutes like INA.

[8] The APA's 1976 amendments did not expand preclusion of review. *Darby v. Cisneros*, 509 U.S. 137, 153 (1993) (*citing* 5 U.S.C. §559 and *Zurko*).

equity suits against federal officers: "where the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions." *Larson*, 337 U.S. at 689; *Ex parte Young*, 209 U.S. 123, 160 (1908); *U.S. v. Lee*, 106 U.S. 196, 213 (1882). Unlike the agencies for which they work, the individual Administration officials lack sovereign immunity here.

Under our common-law heritage, "[t]he acts of all [federal] officers must be justified by some law, and in case an official violates the law to the injury of an individual the courts generally have jurisdiction to grant relief." *Am. Sch. of Magnetic Healing v. McAnnulty*, 187 U.S. 94, 108 (1902). Significantly, the availability of declaratory relief against federal officers predates the APA, WILLIAM J. HUGHES, FEDERAL PRACTICE §25387 (1940 & Supp. 1945); EDWIN BORCHARD, DECLARATORY JUDGMENTS, 787-88, 909-10 (1941), and the APA did not displace that relief. *See* Administrative Procedure Act, Legislative History, 79th Cong., S.Doc. No. 248, 79th Cong., 2d Sess., at 37, 212, 276 (1946); *Dart v. U.S.*, 848 F.2d 217, 224 (D.C. Cir. 1988) ("Nothing in the [APA's] enactment ... altered the *McAnnulty* doctrine of review .... It does not repeal the review of *ultra vires* actions recognized long before, in *McAnnulty*"); *Harmon v. Brucker*, 355 U.S. 579, 581-82 (1958) (relying on *McAnnulty* for the proposition that "generally, judicial review is available to one who has been injured by an act of a government official which is in excess of his express or implied powers"). "Under the longstanding officer suit fiction ..., ... suits against government officers seeking prospective equitable relief are not barred by the doctrine of sovereign immunity." A.B.A. Section of Admin. Law &

Regulatory Practice, *A Blackletter Statement of Federal Administrative Law*, 54 ADMIN. L. REV. 1, 46 (2002). Thus, provided that a plaintiff alleges an ongoing violation of federal law, longstanding equity practice allows suing federal officers who act beyond their lawful authority.

The canon against repeals by implication provides a similar basis to reject the Administration's suggestion that the INA provisions impliedly eliminated whatever APA review existed prior to INA's enactment: "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (alteration in original, interior quotations and citations omitted). Indeed, "this canon of construction applies with particular force when the asserted repealer would remove a remedy otherwise available." *Schlesinger v. Councilman*, 420 U.S. 738, 752 (1975) (internal quotations omitted).

Under that same clear-and-manifest standard, "[w]hen the text of [a statute] is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption." *Altria Group, Inc. v. Good*, 555 U.S. 70, 77 (2008) (interior quotations omitted). Here, the relevant INA provision – 8 U.S.C. §1252(g) – is readily amenable to the States' no-preclusion interpretation. That section bars judicial review by aliens, not by U.S. citizens or states. Under *Home Builders*, this Court should adopt the no-preclusion interpretation.

II. DAPA'S PROMULGATION WAS PROCEDURALLY DEFECTIVE.

By delegating rulemaking authority to agencies, APA delegates functions that the Constitution vests in the Congress. To be valid, legislative rules must either fully satisfy the APA exception to congressional lawmaking or must otherwise satisfy constitutional mandates for the lawmaking function. DAPA cannot meet either test.

A. DAPA's promulgation violated the APA procedurally.

DAPA's promulgation violate APA's rulemaking requirements as a legislative rule issued without either meeting APA's notice-and-comment requirements, 5 U.S.C. §553(b), or satisfying any APA exceptions to those requirements. *Id.* at §553(b)(A)-(B). As such, DAPA is void ab *initio*.

Even if DAPA were *substantively* consistent with immigration law, its promulgation nonetheless would violate the APA notice-and-comment requirements. The APA exemptions for policy statements and interpretive rules do not apply when agency action narrows the discretion otherwise available to agency staff, *Texas Sav. & Cmty. Bankers Ass'n v. Fed. Hous. Fin. Bd.*, 201 F.3d 551, 556 (5th Cir. 2001); *General Elec. Co. v. EPA*, 290 F.3d 377, 380 (D.C. Cir. 2002), and cannot be used to promulgate the regulatory basis on which to confer benefits, *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979) (defining a "substantive rule – or a legislative-type rule – as one affecting individual rights and obligations") (internal quotations omitted); *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 908 (5th Cir. 1983) ("Legislative rules ... grant rights, impose obligations,

or produce other significant effects on private interests") (interior quotations omitted, alteration in original); *Am. Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1112 (D.C. Cir. 1993). DAPA fails these tests.

First, the District Court found DAPA binding in its practical effect, based on record evidence, Pet. App. 386a, and the Administration does not credibly dispute that finding. As numerous *amici* supporting DAPA argue, there are public-policy reasons for issuing a rule on these issues, but that is precisely why APA requires notice and comment: to allow the affected public to voice its concerns.

Second, DAPA plainly *affects* individual rights under *Chrysler*, *supra*. *See also Morton v. Ruiz*, 415 U.S. 199, 235 ("it is incumbent upon agencies to follow their own procedures"). Before issuing procedures and substantive policies that it would then be incumbent on the Administration to follow, the Administration needed to conduct a rulemaking. For example, employment authorization is a benefit that is "granted" to beneficiary aliens, 8 C.F.R. §274a.12(c)(14), under sixteen specific circumstances, 8 C.F.R. §274a.12(a)(1)-(16), none of which apply to the across-the-board DAPA program. *Cf. U.S. v. Picciotto*, 875 F.2d 345, 346-49 (D.C. Cir. 1989) (agency cannot add new, specific, across-the-board conditions under general, case-by-case authority to consider changes). Under the foregoing APA criteria, DAPA qualifies as a legislative rule, which agencies cannot issue by memoranda, policy, or interpretation.

A procedurally infirm rule is a nullity, *Avoyelles Sportsmen's League*, 715 F.2d 897, 909-10; *McLouth Steel Products Corp. v. Thomas*, 838 F.2d 1317, 1322-23 (D.C. Cir. 1988); *State of Ohio Dep't of Human Serv.*

v. U.S. Dept. of Health & Human Serv., Health Care Financing Admin., 862 F.2d 1228, 1237 (6th Cir. 1988); *North Am. Coal Corp. v. Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor*, 854 F.2d 386, 388 (10th Cir. 1988), even where it would have been substantively valid if promulgated via notice-and-comment rulemaking. Thus, DAPA is a nullity.

B. DAPA's promulgation violated the Constitution procedurally.

Although the more typically contested procedural issues arise under APA – and the Administration's failure to comply with APA procedures – this Court should not forget the underlying *constitutional* issue: "All legislative Powers [are vested] in a Congress." U.S. CONST. art. I, §1; *Loving v. U.S.*, 517 U.S. 748, 771 (1996). Allowing an agency to issue legislative rules outside APA's requirements would violate the Constitution.

Specifically, the Administration claims to rely on APA exceptions to congressional lawmaking that Congress itself enacted. 5 U.S.C. §553(b). But failure to follow those APA procedures renders the resulting agency action both void *ab initio* and unconstitutional. *Chrysler*, 441 U.S. at 303; *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act ... unless and until Congress confers power upon it"). In essence, when an agency fails to follow the procedures ordained by Congress – here, the APA delegation of lawmaking power – the resulting rule violates the core constitutional requirements for making law, which "are *integral* parts of the constitutional design for the separation of powers." *INS v. Chadha*, 462 U.S. 919, 946 (1983) (emphasis added). Valid legislative rules

must either satisfy bicameralism and presentment requirements, which "represent[] the Framers' decision that the legislative power of the Federal government be exercised in accord with a single, finely wrought and exhaustively considered, procedure," *Chadha*, 462 U.S. at 951, or they must fully satisfy the limited administrative exemption that APA provides. *FTC v. Morton Salt Co.*, 334 U.S. 37, 44-45 (1948) ("general rule of statutory construction [is] that the burden of proving justification or exemption under a special exception to the prohibitions of a statute generally rests on one who claims its benefits"). When acting within APA requirements, a federal agency *might* be on solid ground. When acting outside those requirements, however, a federal agency simply seeks to usurp congressional power.

III. DAPA VIOLATES IMMIGRATION LAW.

As the States argue convincingly, State Br. 44-59, DAPA violates the substance and the procedure of federal immigration law. Either flaw renders DAPA *ultra vires* and thus void. Moreover, although the Administration claims that Congress ratified its authority for DAPA, that claim is risible in light of the lack of appellate authority, Congress's *subsequent* efforts in 1986 and 1996 to limit illegal aliens' remaining and working here, and Congress's failure to enact the very provisions that the Administration claims that Congress supports.

A. DAPA is fundamentally inconsistent with INA.

As indicated, DAPA violates INA on both substantive and procedural grounds. Either is fatal.

Substantively, immigration law already set the criteria for a parent to obtain lawful-presence status

based on a child's citizenship (*e.g.*, leave the country for their inadmissibility bar of at least three years, await the child's turning 21, and then obtain a family-preference visa while abroad), with no corresponding path for parents to obtain lawful-presence status from their child's mere lawful-presence status. 8 U.S.C. §§1151(b)(2)(A)(i), 1182(a)(9)(B)(i)(II), 1255, 1201(a). For parents with citizen children, DAPA short-circuits these restrictions. For parents with lawfully present, non-citizen children, DAPA is inconsistent with the implied ban, based on the INA restrictions for parents with citizen children. In both cases, DAPA thereby exceeds the Administration's delegated authority.

Procedurally, through DAPA, a non-enforcement agency purports to channel aliens into deferred action under prosecutorial discretion, without initiating the statutorily mandated removal proceeding. Specifically, under 8 U.S.C. §1225(a)(1), "an alien present in the United States who has not been admitted ... shall be deemed for purposes of this chapter an applicant for admission." That designation triggers 8 U.S.C. §1225(a)(3), which requires that all applicants for admission "shall be inspected by immigration officers," which triggers 8 U.S.C. §1225(b)(2)(A)'s mandate that "if the examining immigration officer determines that an alien seeking admission is not clearly and beyond a doubt entitled to be admitted, the alien shall be detained for a [removal] proceeding under section 1229a of this title." In essence, DAPA jumps aliens to a favorable possible result of the removal process, without the statutorily required process that must precede that outcome.

B. The historical pattern of prior deferral actions cannot support a legislative-ratification argument.

The claim that Congress ratified deferred-action policies in DAPA, Admin. Br. 48-60, is not borne out in the historical record of INA enactments, agency actions, or appellate decisions, much less INA's text. As such, the Court must reject the Administration's claim to legislative ratification.

At the outset, a claim to an agency's consistent interpretation would be "a slender reed to support a significant government policy" because "[a]rbitrary agency action becomes no less so by simple dint of repetition." *Judulang v. Holder*, 132 S.Ct. 476, 488 (2011). Nor are there the "unanimous holdings of the Courts of Appeals" for Congress to have accepted and ratified, as in *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S.Ct. 2507, 2520 (2015). Standing alone, of course, prior instances of Executive misconduct cannot "be regarded as even a precedent, much less an authority for the present [misconduct]." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 649 (1952). Something more is plainly required.

That something more should be "'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress and never before questioned,'" which "can 'raise a presumption that the [action] had been [taken] in pursuance of its consent.'" *Medellin v. Texas*, 552 U.S. 491, 531 (2008) (*quoting Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981)) (alterations in *Medellin*). Unfortunately, the history for INA is considerably "broken" by Congress's later action to clamp down on illegal aliens: "illegal aliens do not have the right to remain in the United States

undetected and unapprehended." H.R. REP. NO. 104-725, at 383 (1996).

The history is also not as systematic – or perhaps as synergistic – as the Administration's arguments require. Where Congress has occasionally amended legislation to address humanitarian issues addressed in the first instance administratively, it is critical that that did *not* happen here. Quite the contrary, the legislation that the Administration seeks to issue via DAPA has consistently failed in Congress for more than a decade.

Another issue is scope: perhaps no one would challenge a minor program in the first place, but a reviewing court might hold that truly *de minimis* deviations do not matter, *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 687 & n.29 (1979); *Pa. v. Mimms*, 434 U.S. 106, 111 (1977), perhaps because "*[d]e minimis non curat lex* ... is part of the established background of legal principles against which all enactments are adopted." *Util. Air Regulatory Group v. EPA*, 134 S.Ct. 2427, 2435 n.1 (2014) (interior quotations omitted). Of course, DAPA is not *de minimis* in any way.

The Administration's ratification argument also includes this *non sequitur*: "Congress has repeatedly ratified DHS's authority. See, *e.g.*, 8 U.S.C. 1324a(h)(3)." Admin. Br. 16. The cited subsection is a definition, which provides as follows:

> Definition of unauthorized alien. As used in this section, the term "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B)

> authorized to be so employed by this Act or by the Attorney General.

8 U.S.C. 1324a(h)(3). This pre-1996 definition may imply that the Attorney General has – or at one time had – authority to authorize the employment of certain aliens, but the definition does not *itself* delegate any authority. It would be entirely consistent with this pre-1996 definition for a later-enacted INA amendment to have repealed the Attorney General's employment-authorizing powers, without impacting the status of any aliens affected before Congress began to crack down on employment.[9]

On balance, the Administration's claim that Congress ratified deferred-action plans like DAPA is simply not plausible. As in most (if not all) instances, this Court should simply follow INA's plain text to glean what Congress intended. As shown in Section III.A, *supra*, and by the States at length, Congress did not authorize DAPA.

IV. DAPA VIOLATES THE TAKE CARE CLAUSE.

In granting review here, this Court ordered "the parties ... to brief and argue '[w]hether [DAPA] violates the Take Care Clause of the Constitution.'" *U.S. v. Texas*, 136 S.Ct. 906 (2016). The take-care issue affects this case procedurally and substantively, in both instances against the Administration.

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[9] If this definition itself delegated *carte blanche* authority to authorize employment, it would violate the nondelegation doctrine, which requires "an intelligible principle to which the person or body authorized to exercise the delegated authority is directed to conform." *Mistretta*, 488 U.S. at 372.

Procedurally, the take-care issue will keep this case on track, even if the Administration undergoes a rulemaking to cure the notice-and-comment issue. For example, this Court – like the District Court – might find the States likely to prevail on the procedural APA claims without needing to reach the INA merits. The take-care issue applies not only to the DAPA version now at issue, but also to any curative DAPA versions that the Administration (or its successor) might issue. The take-care issue thus ensures that that the merits would survive mootness, even if a new DAPA version cured the procedural defects.[10]

Substantively, the take-care issue goes further than the substantive INA violations discussed, *supra*. At some level, any substantively or even procedurally *ultra vires* action represents a failure faithfully to execute the laws, U.S. CONST. art. II, §3, but the Take Care Clause requires both more and less: "he shall take Care that the Laws be faithfully executed." *Id.* This clause does not require perfection in execution, but it does require taking care. In this case, the Administration candidly acknowledged the unlawfulness of DACA numerous times before issuing DAPA for political reasons when Congress remained unwilling to act. A court issuing an equitable remedy

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[10] The merits issues regarding impermissible INA bases on which to provide benefits to illegal aliens will remain at issue between the parties, even if a new DAPA version were to moot the States' APA claims. *Super Tire Engineering Co. v. McCorkle*, 416 U.S. 115, 122-24 (1974); *City of Houston v. Dep't of Hous. & Urban Dev.*, 24 F.3d 1421, 1428 (D.C. Cir. 1994) ("well-established that if a plaintiff challenges both a specific agency action and the policy that underlies that action, the challenge to the policy is not necessarily mooted merely because the challenge to the particular agency action is moot") (collecting cases).

in these circumstances could find the Administration willfully violated the law, then tailor the remedy to account for unfaithful willfulness. *Cf. Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 592 (1985) (distinguishing between faithful arbitrators and "arbitrators who abuse or exceed their powers or willfully misconstrue their mandate under the governing law"); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 46-47 (1991) (sanctions for willful violations of court orders). Our quadrennial elections do not choose a temporary despot. Instead, the Constitution requires presidents to faithfully execute the laws that Congress has passed. U.S. CONST. art. II, §3. Courts must hold presidents to that standard.

The States close their brief with a chilling excerpt from Justice Jackson's *Youngstown* opinion, States' Br. 76-77, but he is worth quoting in full:

> With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations. Such institutions may be destined to pass away. But it is the duty of the Court to be last, not first, to give them up.

343 U.S. at 655. Justice Jackson put *Youngstown* within a "judicial tradition" beginning with Chief Justice Coke's admonishing his sovereign that "[the King] is under God and the Law" when "King James took offense at the independence of his judges," which the King deemed treasonous. 343 U.S. at 655 n.27 (interior quotations omitted). Following Coke and Jackson, this Court must reject the Administration's overreach here.

CONCLUSION

This Court should affirm the Fifth Circuit.

April 4, 2016

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